No. 75-1661

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

VALLEY MOLD COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 31a-34a) is reported at 530 F. 2d 693. The Board's supplemental decision and order (Pet. App. 1a-30a) are reported at 215 NLRB No. 38.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1976. The petition for a writ of certiorari was filed on May 14, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in administrative proceedings to determine backpay liability, an employer is entitled to take depositions for the purpose of discovery.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and of the Board's Rules and Regulations are set forth at Pet. App. 35a-36a, 41a-43a, and in the Appendix, *infra*, pp. 1a-3a).

STATEMENT

On June 24, 1971, the National Labor Relations Board issued a Decision and Order (191 NLRB 498) finding, *inter alia*, that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act by laying off seventeen employees for the purpose of discouraging membership in the Union,[1] and by discharging nine employees because of their activities on behalf of the Union. The Board's order required the Company to compensate the laid off employees for any loss they may have suffered by reason of the illegal layoff, and to offer the discharged employees immediate and full reinstatement to their former or substantially equivalent positions and to compensate them for any loss of earnings suffered as a result of the illegal discharge. The Board also enjoined the Company from all forms of unlawful interference with employees' Section 7 rights (191 NLRB at 501-502). On October 26, 1972, the court of appeals enforced the Board's order (467 F. 2d 482).

The Board's Acting Regional Director thereafter issued and served on the Company, pursuant to the Board's regulations (29 C.F.R. 102.52-102.59), a specification of the backpay allegedly due each of the discharged and laid off employees, which showed the gross wages which each

[1]District Lodge No. 13 of the International Association of Machinists and Aerospace Workers, AFL-CIO.

employee would have earned on a calendar quarter basis, his interim earnings from other employment, his expenses, and the resulting net backpay due the employee (Pet. App. 5a; R. 182-194).[2] The specification also stated that a hearing on the allegations in the specification would be held before an Administrative Law Judge on January 29, 1974 (R. 193). The Company answered, with respect to each claimant, that it was "without knowledge or information sufficient to form a belief as to the amounts of net interim earnings * * *" (Pet. App. 5a).

On January 4, 1974, the Company filed with the Regional Director an application to take the depositions of the eight backpay claimants who had been illegally discharged[3] (Pet. App. 6a). The Regional Director denied the application on the ground that the Company had failed to show "good cause" for taking such depositions as required by the Board's Rules and Regulations (29 C.F.R. 102.30; App., *infra*, pp. 1a-3a). Specifically, the Regional Director found that the proposed depositions were "for the purpose of [the Company's] convenience" rather than because of illness or unavailability of the witnesses; that the witnesses that the Company wished to depose all resided within reasonable proximity to the place of the hearing and therefore could be cross-examined in person at the hearing; and that the Company actually was seeking prehearing discovery, against which the Board had a long standing policy (Pet. App. 6a; A. 204).

[2]"R." refers to the joint appendix to the briefs filed in the court below.

[3]Because one of the nine employees who had been illegally discharged was found to have suffered no loss of earnings, backpay was claimed only for eight employees (A. 183).

At the commencement of the hearing before the Administrative Law Judge, the Company reiterated its objection to the denial of its request to take depositions. The Law Judge overruled the Company's objection, noting that all the backpay claimants were present and available for cross-examination (Pet. App. 6a). Each of the eight discharged claimants who was eligible for backpay was called as a witness by the General Counsel and cross-examined by the Company (Pet. App. 7a, 33a). At the completion of the General Counsel's evidence, the Company moved for a continuance to take depositions from all the employers with whom the claimants testified they had sought interim work (Pet. App. 7a; A. 175-176). The Law Judge denied the motion; counsel for the Company thereupon declined to go forward, stating that he felt that he could not adequately defend the Company because he had been denied a reasonable opportunity to present a defense (Pet. App. 7a; R. 174, 176-181).

During the next two months, the Administrative Law Judge twice offered the Company an opportunity to reopen the record for an additional hearing to take evidence from any person allegedly involved in the claimants' efforts to secure interim employment, and stated that subpoenas would be available to insure the attendance of such witnesses. The Law Judge also stated that he would consider recalling the claimants after the Company introduced any evidence it had bearing on the issues (Pet. App. 33a, 8a-9a). On March 27, 1974, the Company moved "under protest" to reopen the record and indicated in an accompanying letter that it would petition the federal district court for injunctive relief (Pet. App. 9a; R. 227-228). On April 2, 1974, the Administrative Law

Judge issued an order reopening the record for an additional hearing to take evidence from any person allegedly involved in the claimants' efforts to secure interim employment (Pet. App. 9a; A. 228).[4]

On April 5, 1974, the Company commenced an action in the United States District Court for the Southern District of Ohio, seeking an injunction to postpone the reopening of the hearing and to require the Administrative Law Judge to permit the taking of depositions (Pet. App. 9a). The Company also filed with the Administrative Law Judge a Motion to Suspend the Hearing Date (Pet. App. 9a; R. 229, 238). The Administrative Law Judge thereafter withdrew the order reopening the record for additional hearing and closed the record, on the ground that the Company was continuing to insist upon the use of depositions in the presentation of its case (Pet. App. 9a, 28a-30a).[5]

On May 13, 1974, the Administrative Law Judge determined that the eight employees who had been illegally discharged were entitled to backpay totalling $39,742.98, plus interest, and that the seventeen employees who had been illegally laid off were entitled to backpay totalling $941.90, plus interest (Pet. App. 25a-26a). The Company thereafter filed exceptions with the Board. The Board affirmed the Law Judge, and ordered the Company to pay the employees the amount of backpay set forth in

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[4]The Administrative Law Judge had denied an earlier motion to reopen the record because that motion, which was essentially identical to the motion made by the Company at the close of the hearing, clearly contemplated the taking of depositions (Pet. App. 8a-9a; R. 222, 225-226).

[5]The Board's subsequent motion to dismiss the district court action was unopposed and was granted.

the Law Judge's order (Pet. App. 1a-3a). The Board rejected the Company's procedural objections on the ground that "[t]he Board's rules provide an adequate procedure to protect [the Company's] rights" (Pet. App. 2a, n. 2).

The court of appeals enforced the Board's order (Pet. App. 31a-34a), reasoning that the Board's rules did not establish a right to take depositions for purposes of prehearing discovery; that the Administrative Law Judge did not abuse his discretion in denying the Company's motion for a continuance to take depositions, since the Company was not prejudiced thereby; and that there was "no merit in the Company's claim of deprivation of due process" (Pet. App. 32a-34a).

ARGUMENT

1. Petitioner contends (Pet. 13-20) that it was denied due process by the denial of its application to take prehearing depositions of the backpay claimants who had been unlawfuly discharged and by the denial of its motion for a continuance to take prehearing depositions of employers with whom the claimants allegedly had sought interim employment. It is established, however, that the Fifth Amendment does not require that parties to judicial or quasi-judicial proceedings be permitted to take prehearing depositions. *National Labor Relations Board* v. *Interboro Contractors, Inc.*, 432 F.2d 854, 857-858 (C.A. 2), certiorari denied, 402 U.S. 915; *Starr* v. *Commissioner*, 226 F.2d 721, 722 (C.A. 7), certiorari denied, 350 U.S. 993.

2. Contrary to petitioner's further contention (Pet. 21-22), neither the National Labor Relations Act nor the Administrative Procedure Act, 5 U.S.C. 551, *et seq.*, requires that parties to administrative backpay hearings be permitted to take prehearing depositions for the purpose of discovery. It is established that the National Labor

Relations Act does not require the Board to follow discovery procedures set out in the Federal Rules of Civil Procedure, *National Labor Relations Board* v. *Interboro Contractors, Inc., supra*, 432 F.2d at 859, and there is no provision in the Act mandating prehearing discovery, *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F.2d 748, 751 (C.A. 9). It is also established that the Administrative Procedure Act does not confer a right to discovery in administrative proceedings. *Frilette* v. *Kimberlin*, 508 F.2d 205, 208 (C.A. 3), certiorari denied, 421 U.S. 980.

3. The Administrative Law Judge did not abuse his discretion in denying petitioner's motion for prehearing depositions. Board Rule 102.30(a) (29 C.F.R. 102.30(a); App., *infra*, pp. 1a-2a), provides that an Administrative Law Judge may permit prehearing depositions "if in his discretion good cause has been shown." Here, all the claimants were available for cross-examination at the hearing, and the Administrative Law Judge twice offered petitioner the opportunity to reopen the record for the purpose of taking evidence from any person alledgedly involved in the claimants' efforts to secure interim employment, and stated that subpoenas would be available to insure the attendance of such witnesses. Accordingly, petitioner was not prejudiced by its inability to depose these witnesses.

There is no conflict among the circuits on this issue. Although, as petitioner points out, the circuits are in some disagreement as to the appropriate scope of the Law Judge's discretion to find "good cause" to permit depositions,[6] there is no disagreement that refusal to permit

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[6]The Second Circuit and the National Labor Relations Board have held that, under the Board's rules, an Administrative Law Judge may find "good cause" to permit the taking of depositions only when the witness to be deposed is likely to be unavailable at the hearing,

depositions in a backpay proceeding is not an abuse of discretion where, as here, there has been no prejudice. *Electromec Design and Development Company* v. *National Labor Relations Board,* 409 F.2d 631, 635 (C.A. 9); *National Labor Relations Board* v. *Rex Disposables,* 494 F.2d 588, 592 (C.A. 5); *Winn-Dixie Stores, Inc.* v. *National Labor Relations Board,* 413 F.2d 1008, 1010 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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National Labor Relations Board v. *Interboro Contractors, Inc., supra;* the Fifth Circuit has held that the Law Judge has discretion to find "good cause" so long as depositions are practicable under the circumstances and they are not used to harass or coerce employees. *National Labor Relations Board* v. *Miami Coca-Cola Bottling Company,* 403 F.2d 994, 996. See also *National Labor Relations Board* v. *Safeway Steel Scaffolds Company of Georgia,* 383 F.2d 273, 277 (C.A. 5).

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APPENDIX

The relevant provisions of the National Labor Relations Boards Rules and Regulations (29 C.F.R. 102.1, *et seq.*) are as follows:

§ 102.30 *Examination of witnesses; depositions.* —Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition.

(a) Applications to take depositions shall be in writing setting forth the reasons why such depositions should be taken, the name and post office address of the witness, the matters concerning which it is expected the witness will testify, and the time and place proposed for the taking of the deposition, together with the name and address of the person before whom it is desired that the deposition be taken (for the purposes of this section hereinafter referred to as the "officer"). Such application shall be made to the regional director prior to the hearing, and to the administrative law judge during and subsequent to the hearing but before transfer of the case to the Board pursuant to § 102.45 or § 102.50. Such application shall be served upon the regional director or the administrative law judge, as the case may be, and upon all other parties, not less than 7 days (when the deposition is to be taken within the continental United States) and 15 days (if the deposition is to be taken elsewhere) prior to the time when it is desired that the deposition be taken. The regional director or administrative law judge, as the case may be, shall upon receipt of the application, if in his discretion good cause has been shown, make and serve upon the parties an order which will

specify the name of the witness whose deposition is to be taken and the time, the place, and the designation of the officer before whom the witness is to testify, who may or may not be the same officer as that specified in the application. Such order shall be served upon all the other parties by the regional director or upon all parties by the administrative law judge.

(b) Such deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, including any agent of the Board authorized to administer oaths. If the examination is held in a foreign country, it may be taken before any secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States.

(c) At the time and place specified in said order the officer designated to take such deposition shall permit the witness to be examined and cross-examined under oath by all the parties appearing, and his testimony shall be reduced to typewriting by the officer or under his direction. All objections to questions or evidence shall be deemed waived unless made at the examination. The officer shall not have power to rule upon any objections but he shall note them upon the deposition. The testimony shall be subscribed by the witness in the presence of the officer who shall attach his certificate stating that the witness was duly sworn by him, that the deposition is a true record of the testimony and exhibits given by the witness, and that said officer is not of counsel or attorney to any of the parties nor interested in the event of the proceeding or investigation. If the deposition is not signed by the

witness because he is ill, dead, cannot be found, or refuses to sign it, such fact shall be included in the certificate of the officer and the deposition may then be used as fully as though signed. The officer shall immediately deliver an original and two copies of said transcript, together with his certificate, in person or by registered mail to the regional director or the administrative law judge, care of the chief administrative law judge in Washington, D.C., or associate chief administrative law judge, San Francisco, Calif., as the case may be.

(d) The administrative law judge shall rule upon the admissibility of the deposition or any part thereof.

(e) All errors or irregularities in compliance with the provisions of this section shall be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or, with due diligence, might have been ascertained.

(f) If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used like other depositions.